No. 7657

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

HARRY W. BERDIE, et al.,
Appellants,

vs.

CHARLES J. KURTZ, et al.,
Appellees.

Appeal From the District Court of the United States,
Southern District of California,
Central Division

Petition for Rehearing

HAROLD M. STEPHENS,
Assistant Attorney General,
PEIRSON M. HALL,
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SUBJECT INDEX

CITATIONS AND AUTHORITIES

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COME NOW the appellants and move that the order affirming the decree of the lower court for a temporary injunction entered herein, on or about March 4, 1935, be vacated and set aside and that a rehearing of this cause be granted on the following grounds:

I. With respect to the interstate commerce feature of this case, the majority opinion of the court has quite clearly and fairly stated the position of appellants. (See majority opinion, pp. 9 and 10). Briefly stated, appellants' position is that the facts shown by the record clearly disclose that the intrastate activities of Los Angeles milk distributors are in the current of interstate commerce and burden, obstruct and affect interstate commerce, and hence are subject to Federal regulation.

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The majority opinion, while clearly and fairly stating appellants' position in this respect, does not decide or express any opinion on the question whether such facts constitute an affecting, burdening, or obstructing of interstate commerce, so as to justify Federal regulation; instead, the majority opinion holds that regardless of the effect of intrastate activities upon interstate commerce in milk and milk products, the language of Section 8(3) of the Agricultural Adjustment Act indicates that Congress did not intend to exercise any authority over such transactions.

The majority opinion holds the Los Angeles Milk License to be void solely upon its construction of the phrase "in the current of interstate commerce" as used in Section 8(3). In view of the facts (1) that the majority opinion has carefully refrained from holding that the facts disclosed in this record do not constitute an affecting, burdening, or obstructing of interstate commerce, and (2) that the dissenting opinion squarely holds that such facts justify the Federal regulation of milk by the Los Angeles Milk License, and (3) in view of the importance to the Government of the question of statutory construction passed upon by the majority opinion, appellants are filing this petition for rehearing which is addressed to the question of statutory construction *which was not* raised or discussed by any of the parties in their briefs, and, to the proposition—

II. That the court was under a misapprehension in determining that the appellees were entitled to equitable relief in that appellees did not allege or prove that they would be damaged irreparably, or otherwise, by relying on their legal defenses, and to the proposition that—

III. The court was under a misapprehension in sustaining the injunction against the maintenance of a state court action in that no showing was made that the state court action for money in any manner interfered with the jurisdiction of the federal court in the injunction procedure.

I.

The Precise Holding of the Majority Opinion in Regard to the Phrase "In the Current of Interstate or Foreign Commerce."

In reference to interstate commerce, briefly stated, the majority opinion holds:

1. That the phrase "in the current of interstate or foreign commerce" as used in Section 8 (3) "is restrictive rather than expansive in its effect" (majority opinion, page 12, last paragraph).

2. That the amendment of Section 8 (2) on April 7, 1934, by the addition of the words "or in competition with, or so as to burden, obstruct, or in any way affect, interstate or foreign commerce" indicates the intention of Congress to expand the scope of sub-section 2 beyond that of sub-section 3, which was not similarly amended.

We do not understand the majority opinion to hold that if the phrase "in the current of interstate commerce" as originally used in both sub-sections (2) and (3) was sufficiently broad and comprehensive to include transactions which affect, burden, or obstruct, interstate commerce, then the effect of amending 8 (2) without similarly amending 8 (3) was, as a matter of law, to change and modify the meaning of the phrase "in the current of interstate commerce" as used in Section 8 (3).

In this petition, therefore, we shall respectfully contend that the majority opinion was in error in its construction of Section 8 (3) in limiting the meaning of "in the current of interstate commerce" in such a fashion as to exclude those activities which affect, burden, and obstruct interstate commerce.

A.

The Origin and Meaning of the Phrase "In the Current of Interstate Commerce" as Shown by the Decisions of the Supreme Court of the United States.

The choice of the phrase "in the current of interstate commerce" in Section 8 as originally enacted was not a haphazard one. Had Congress originally intended, as the majority of this court has held, to restrict the scope of sub-sections 2 and 3 of Section 8 to transactions themselves in interstate commerce, Congress could readily have said so. The phrase "current of interstate commerce" would not then have been used and both sub-section 2 and sub-section (3) would have been concerned with the handling of agricultural commodities "in interstate commerce."

Congress did not use the language which it would naturally have used had its intention been as the majority of this court has construed it to be. Instead, it used a phrase which, by prior legislative usage and by decision, had come to have a broader meaning. The phrase "current of commerce" originated in the decision of the Supreme Court in *Swift & Co. v. United States*, 196 U. S. 375, where the court said (pages 398 and

399), in answer to the objection that the purchase and sale of cattle in the stockyards in Chicago did not constitute interstate commerce because the transactions occurred within the border of a single state:

> "Commerce among the states is not a technical legal conception, but a practical one, drawn from the course of business. When cattle are sent for sale from a place in one state, with the expectation that they will end their transit, after purchase, in another, and when in effect they do so, with only the interruption necessary to find a purchaser at the stock yards, and when this is a typical, constantly recurring course, the current thus existing is a current of commerce among the states, and the purchase of the cattle is a part and incident of such commerce."

The court conceived of the continuous movement of cattle from the plains of the West and Southwest through the packing plants to the consumption centers in the East as a current of commerce among the several states and held that the intrastate character of individual transactions occurring in the movement did not place them beyond the power of national regulation.

The phrase used by the Supreme Court in the *Swift* case, to express its intention to subject intrastate transactions to Federal control, was adopted by Congress in formulating the Packers and Stockyards Act of 1921. After defining the term "commerce" as used in that Act, Congress further stated in Section 2 (b) that "a transaction in respect to any article shall be considered to be in commerce if such article is part of that current of commerce usual in the livestock and meat-packing indus-

tries * * * ." The purpose of Congress was clear. It intended to include within the scope of the Act transactions occurring in the movement of the commodity which, considered by themselves and apart from the constant interstate movement, were intrastate in character; and to carry out its intentions, Congress adopted a phrase of known content, "current of commerce." The validity of the Packers and Stockyards Act of 1921 was challenged in *Stafford v. Wallace*, 258 U. S. 495, upon the ground that the purchases and sales of cattle in the stockyards in Chicago occurred within the boundaries of a single state and so were beyond congressional power. The court recognized that by the use of the phrase "current of commerce" Congress had appropriately expressed its intention to bring intrastate transactions under Federal control, and the validity of the Act was sustained. The court said (p. 520):

> "It is manifest that Congress framed the Packers and Stockyards Act in keeping with the principles announced and applied in the opinion in the Swift case. The recital in Section 2 (b) of title 1 of the Act quoted in the margin leaves no doubt of this. The Act deals with the same current of business, and the same practical conception of interstate commerce."

Again, when Congress sought to impose upon the boards of trade throughout the country a national system of regulation in the Grain Futures Act of 1922, it adopted the same technique. After defining the phrase "interstate commerce" as used in the Act, it added to the definition Section 2 (b) which provided that "a trans-

action with respect to any article shall be considered to be in interstate commerce if such article is part of that current of commerce usual in the grain trade * * * ." The validity of the Act was challenged in *Chicago Board of Trade v. Olsen,* 262 U. S. 1, upon the ground that the impact of the regulation was upon transactions in grain futures which had theretofore been held not to be interstate commerce. (*Hill v. Wallace,* 259 U. S. 44.) In *Hill v. Wallace,* the court had said (p. 69):

> "It follows that sales for future delivery on the Board of Trade are not, in and of themselves, interstate commerce. They cannot come within the regulatory power of Congress as such, unless they are regarded by Congress, from the evidence before it, as directly interfering with interstate commerce so as to be an obstruction or a burden thereon."

In the Grain Futures Act of 1922, which was before the court in the *Olsen* case, Congress had manifested its intention to subject to Federal control intrastate transactions in sales for future delivery by the use of the phrase "current of commerce." The validity of the Act and the aptness of the phrase "current of commerce" to describe transactions "directly interfering with interstate commerce so as to be an obstruction or a burden thereon" were sustained by the Supreme Court.

The declaration of emergency and the declaration of policy quoted in our original brief), which preface the Agricultural Adjustment Act indicate clearly that Congress intended by the Act to alleviate the economic crisis in agriculture, by increasing the purchasing power of the American farmer. The declaration of emergency con-

tains a finding by Congress that the prevailing critical conditions in the basic industry of agriculture "have affected transactions in agricultural commodities *with a national public interest* * * * and render imperative the immediate enactment of Title I of this Act." The powers which Congress vested in the Secretary of Agriculture to accomplish the important purposes of the Act are broad and comprehensive. It is clear that Congress intended to exercise to the full the powers vested in it by the Constitution in order to alleviate the economic crisis "more serious than ever." It would be a strained construction of the Act which would permit the Secretary of Agriculture under Section 8 (3) to increase the purchasing power of only that portion of each agricultural commodity which physically moves in interstate commerce. That Congress did not intend that Section 8 (3) should be so restrictively interpreted is further borne out by a consideration of its legislative history.

B.

The Legislative History of the Amendment to Section 8(2) and the Proposed Amendment to Section 8(3).

Section 8(2) of the Act was amended on April 7, 1934, by the addition of the words, *"or in competition with, or so as to burden, obstruct, or in any way affect,* interstate or foreign commerce." Section 8(3) was not similarly amended. Concerning the effect of the amendment to Section 8 (2), the prevailing opinions states: "This difference in language marks a definite change of thought." The minority opinion does not adopt this view, but holds

that Congress intended to and did subject to national regulation intrastate transactions such as those involved in the case at bar.

In such a situation, where there is doubt as to the intention of the legislative body, it is settled that resort will be had to the legislative history of the bill, and particularly to the reports of committees of Congress, in order to determine the legislative intent.

Church of the Holy Trinity v. United States, 143 U. S. 447;

Duplex Printing Press Co. v. Deering, 254 U. S. 443, 474;

Binns v. United States, 194 U. S. 486, 495;

N. Y. C. R. Co. v. Winfield, 244 U. S. 147, 150;

Whitney v. United States, (C. C. A. 9), 8 Fed. (2d) 476, 478;

Jordan v. United States (C. C. A. 9), 36 Fed. (2d) 43;

Ng Fung Ho v. White, (C. C. A. 9), 266 Fed. 765.

The bill to amend Section 8(2) of the Act originated in the House of Representatives, was passed by that body, and after amendment was passed by the Senate. The House refused to concur in the Senate amendments and the Senate refused to recede from its amendments. Conference committees were appointed.

Th report of the House Conference Committee explains the purpose of the Senate amendments. (Senate Conference Committee Reports are not printed). Concerning the effect of the amendment here involved, which originated in the Senate, the House Conference Committee on March 26, 1934 made the following statement in its

report to the House (73d Congress, 2nd Session, House Report No. 1051, p. 4):

> "Amendment No. 6: This amendment amends the provision of the Agricultural Adjustment Act which authorizes the Secretary of Agriculture to enter into marketing agreements. It broadens the class of parties with whom agreements can be made to include producers, *and clarifies the provision so that express authorization is given to enter into agreements with parties handling agricultural commodities and products in competition with or affecting interstate or foreign commerce.*" (Italics ours).

The intention of Congress is plain. It was *not* to *expand* the scope of the original provision, but rather to clarify the language and to state *expressly* what had always been the legislative intent.

A bill amending Section 8(3) of the Act so that the scope of the delegated power with respect to marketing agreements and licenses would be expressed in identical language was introduced in the Senate during the second session of the 73d Congress. This bill was introduced on March 28, after the Conference Report on the amendment to Section 8(2) was approved by the House, and the day before it was approved by the Senate. The proposed amendment to Section 8(3) authorized the Secretary—

> "(I) To prohibit processors, distributors (including producers and associations of producers, who are processors or distributors) and others from engaging in the handling of any agricultural commodity or product thereof, or any competing commodity or product thereof, in the current of or in

> competition with, or so as to burden, obstruct, or in any way affect, interstate or foreign commerce without a license, and (II) to issue licenses to permit processors * * * to engage in such handling * * *."

This bill, introduced late in the session, was not enacted and *was never submitted to a vote in either House.* It was introduced only in the Senate and was considered by the Senate Committee on Agriculture which reported the bill out of committee with the recommendation that it do pass. Concerning the effect of this proposed amendment, the report of the Senate Committee on Agriculture stated (73d Congress, 2d Session, Senate Report No. 1120, p. 2):

> "The first paragraph, lettered (A), follows the language of the first two sentences of section 8(3) of the present act, except in the following respects: (a) It *states clearly* the implied power the Secretary *has under the present licensing provision* to prohibit those who have no licenses, when licenses are required, from engaging in the handling of agricultural commodities *so as to affect interstate or foreign commerce.*" (Italics ours).

This report indicates beyond doubt (a) that Congress considered the existing language of sub-section (3) adequate to express its intention to exercise its control over those transactions which affect, obstruct or burden interstate commerce, and (b) that Congress considered that the addition of the words emphasized by the majority opinion of this court would effect no change of meaning, but would merely clarify the statement of powers already granted.

The statement of District Judge Baltzell in the opinion in *United States v. Greenwood Dairy Farms, Inc.*, 8 Fed. Supp. 398 that this proposed amendment "failed of passage" is inaccurate. The term "failed of passage" is properly applied when a bill is submitted to a vote upon the question of whether or not it shall pass, and fails to secure the requisite number of votes. This bill was never submitted to any vote. As District Judge Chestnut pointed out in his opinion in *Royal Farms Dairy, Inc. v. Wallace*, 8 Fed. Supp. 975, the amendment had apparently "never been brought to a vote in Congress."

To summarize:

(1) The report of the House Conference Committee on the amendment to Section 8(2) shows that the amendment was intended only to clarify the language of this section and was not intended *to broaden* the scope of its operation.

(2) The Senate Committee Report upon the proposed amendment to Section 8(3) shows that Congress considered the existing language of Section 8(3) sufficiently broad to include intrastate transactions, and that the addition of the words inserted by amendment in Section 8(2) would not alter the scope of the section but would merely state clearly the power *already conferred* upon the Secretary of Agriculture.

II.

The Appellees Are Not Entitled to Equitable Relief

The only reference in the opinion to the cause for equity intervening is that the "actions of the appellant constitute trespass." This statement is evidently under a

misapprehension of the facts appearing in the record in this case.

The court in the majority opinion further states that the only thing the appellees are seeking to establish is "their right to conduct their business under the constitutional guarantee of freedom under the right of contract." It is shown by the record and recognized as a fact by the majority opinion that the appellees voluntarily ceased to do business. It is submitted that no trespass can be effected upon any person's rights or against any persons if they voluntarily cease to operate. Trespass comprehends injury or the ability to inflict injury, and certainly no injury can be inflicted upon any person who is not in a position to be injured, such as appellees in this case who voluntarily quit business. None of the appellants had any dealings with the appellees since they had ceased to do business. As to any punishment or legal action that might be taken against them for any alleged violation of the act, the appellant Peirson M. Hall is the only one who could have become active in enforcing the law and there was no showing that he had threatened to do so or that he had been requested to do so by the Secretary of Agriculture or the Attorney General, without which previous request as appears from the face of the Agricultural Adjustment Act he was without any power or authority. (Sec. 8 (E), (7) *Agr. Adj. Act.*)

The only action as against appellees reflected in the entire record is the demand of the officials who had been in charge of License No. 17 that such appellees pay to such officials and account for such monies as they had collected and were holding under and

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by virtue of said License No. 17, and for which a suit had been brought in the State courts of California. Certainly the enforcement of a right in the court having jurisdiction to adjudicate that right cannot be considered as a trespass. It does not appear from the record that the $52,000 alleged to be in the possession of appellees is the property of the appellees, and appellee's possession of said money should not be protected in a court of conscience. It was the property of the producers of milk which those producers authorized the appellees to retain from money which those producers were entitled to receive and which retention of money by appellees was authorized for one specific purpose, namely, to be used in conformity with the provisions of License No. 17. No authorization by those producers to appellees to bring the instant suit is shown in the record, nor is any consent shown in the record. It is submitted that the action of the appellees in deducting the $52,000 from the producers of milk from whom they bought the milk constituted a contract and created in the hands of appellees a trust fund. The effect of the court's opinion is to enable appellees to hold this money and not to be required to account therefor. Certainly any legal defense appellees might have to an action to account for that money could be fairly asserted in a court of law and did not warrant the interference of a court of equity by injunction. It is thus seen that instead of any injury being threatened to appellees the injury occurs to those who are not before this court, namely, the producers of milk.

Section 3440 of the Civil Code of the State of California is intended to prevent debtors from committing a

fraud upon their creditors by transferring their property without notice. It is shown by the Record (R. 303) that the appellees in the instant matter transferred their assets and property on the 30th day of July, 1934, without compliance with the provisions of said Section 3440 of the Civil Code of the State of California. The appellees having violated the state statutes intended to prevent fraud are in a position of coming into a court of equity and securing an injunction to protect them in that conduct.

III.

The State Court Action for Money is Not an Evasion of the Prior Jurisdiction of the Federal Court

The majority opinion dismisses the injunction of the state court actions by the mere statement that Section 379 of Title 28, U. S. C. A., has no application where the jurisdiction of the federal court has been invoked previous to the action of the state court. This is either a misapprehension of the facts involved in this case or of the law applicable thereto. The Record shows that the federal court action was filed January 11, 1934 (R. 48). No injunction was granted on that bill. Appellants Milk Producers, Inc., on the 19th day of July, 1934, filed an action in the Superior Court of the State of California in and for the County of Los Angeles, against appellees Lucerne Cream and Butter Company and Safeway Stores, Inc., for the recovery of $18,454.01 (being a portion of the $52,000 alleged to be held by all appellees) *and at that time no judgment had been obtained and no injunction was in force in the federal court in the within action or any action between the*

parties. The Supplemental Bill of Complaint was filed September 4, 1934 (R. 234). The entire cause of action is stated in the supplemental bill and only seeks to enjoin the defendants therein (appellants here) from enforcing the Milk Licenses. The within action is strictly an action *in personam* as distinguished from an action *in rem* and the court did not in any manner assert any jurisdiction of the *property* of any of the parties to the suit. The state court action, as alleged in the Supplemental Bill of Complaint, and as set out in the evidence (R. 300) was only for the *recovery of money* which it was alleged appellees had in their possession by virtue of the Milk License and which did not belong to them. All demands for money from appellants, amounting to the sum of $52,000 (R. 303) was of the same nature. In the state court actions, no effort was made to take possession of the property of the parties nor did the state court in any manner assert any jurisdiction which was in the least in conflict with the injunction action pending in the District Court. Under such conditions even though the subject matter is the same, the state court and the federal court actions may be maintained at the same time and the federal court cannot enjoin the state court action. That such is the law was definitely decided by the Supreme Court of the United States on the 4th day of February, 1935, in the case of *Pennsylvania General Casualty Company vs. Commonwealth of Pennsylvania,* being case No. 431—October Term, 1934, ... U. S. ..... In that case Mr. Justice Stone writing the opinion for the court said:

> (p. 4) "Where the judgment sought is strictly *in personam*, for the recovery of money or for an

> injunction compelling or restraining action by the defendant, both a state court and a federal court having concurrent jurisdiction may proceed with the litigation, at least until judgment is obtained in one court which may be set up as res adjudicata in the other."

That case seems to fully determine the matter that the state court actions should not have been enjoined in this case.

Conclusion

The foregoing legislative history was not before this court when its opinion was rendered. In view of this legislative history, we earnestly contend that the majority opinion was in error in holding that the amendment to Section 8 (2) of the Agricultural Adjustment Act marks "a definite change of thought." This question of statutory interpretation, here presented, is one of great importance to the Government, and the decision of this question will have very important practical consequences.

Apart from this question of statutory construction, the dissenting opinion in this case has squarely held that the economic facts, disclosed by this record, justify the Federal regulation of milk as contained in the Los Angeles Milk License.

It is earnestly requested that this court grant a petition for rehearing on the three above mentioned questions and upon such hearing hold that the Federal regulation contained in the Los Angeles Milk License

is lawfully justified and that the decision of the lower court should be reversed.

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Attorneys for Appellants.

CERTIFICATE

I hereby certify that the foregoing petition is, in my opinion, well founded in law and should be granted and is not interposed for delay.

PEIRSON M. HALL,
United States Attorney.